

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CHERYL L. FLETCHER,

Plaintiff,

CV No. 07-00429-AS

v.

FINDINGS AND
RECOMMENDATION

COMMISSIONER of Social Security; and the
SOCIAL SECURITY ADMINISTRATION,

Defendants.

ASHMANSKAS, Magistrate Judge:

Presently before the court is Defendants' Motion to Dismiss Counts 2 and 3 of Plaintiff's Complaint (No. 10). Counsel for plaintiff has filed several cases in this district on behalf of various plaintiffs that allege substantially identical claims to those alleged in the present action: (1) a traditional challenge to the agency's decision denying social security benefits; (2) a Freedom of Information Act ("FOIA") claim under 5 U.S.C. § 552; and (3) a constitutional claim under the Fifth and Ninth Amendments challenging the agency's actual or pretextual reliance on "Vocational Expert testimony about numbers of jobs that [the Commissioner] know[s] or should [have] know[n] to be

unreliable." Compl. at 3, ¶ 10(a). In these other cases, the Commissioner has filed substantially similar motions to the one at issue, *i.e.*, to dismiss the FOIA and Constitutional claims, pursuant to Rules 12(b)(1) and (6) and 12(c) of the Federal Rules of Civil Procedure. In fact, plaintiff's counsel moved to consolidate similar motions by the Commissioner in eight other cases on the ground that each raised similar issues of law and fact.

Though the Commissioner's motions were not formally consolidated, the reasoning set forth in Judge Aiken's May 16, 2007, Opinion and Order granting the motion to dismiss counts 2 and 3 in *Romans v. Astrue*, CV No. 06-1331-AA (No. 29), has been consistently adopted. *See D'Annibale v. Astrue*, CV No. 06-1202-ST (Nos. 34, 41); *Cooley v. Astrue*, CV No. CV 06-1332-KI (No. 33); *Jaynes v. Astrue*, CV No. 06-1771-KI (No. 28); *Ellis v. Astrue*, CV No. 07-0209-MO (No. 23); *Randall v. Astrue*, CV No. 07-0037-BR (No. 26); and *Howard v. Astrue*, CV No. 07-0365-PK (No. 18).

Plaintiff did not move to consolidate the present motion. (Defendants filed it after Judge Aiken's opinion in *Romans v. Astrue*.) Nonetheless, the parties' arguments in regard to the present motion to dismiss are substantially similar to those made in regard to the motions to dismiss previously granted in the cases referenced above. Consequently, for the reasons set forth in *Romans v. Astrue*, defendants' motion should be granted. Specifically, count two should be dismissed because no records have been withheld from counsel, and thus, the court lacks subject matter jurisdiction. *See* 5 U.S.C. § 552(a)(4)(B). Count three should be dismissed because plaintiff fails to allege a colorable claim under the Constitution.

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CONCLUSION

For these reasons Defendants' Motion to Dismiss Counts 2 and 3 of Plaintiff's Complaint (No. 10) should be GRANTED.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due no later than October 3, 2007. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

If objections are filed, any party may file a response within fourteen days after the date the objections are filed. Review of the Findings and Recommendation will go under advisement when the response is due or filed, whichever date is earlier.

DATED this 18th day of September, 2007.

/s/Donald C. Ashmanskas
DONALD C. ASHMANSKAS
United States Magistrate Judge